



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
-----------------	-------------	----------------------	---------------------	------------------

09/702,037

10/27/2000

Peter Bennett Duff Whyte

U013032-6

8344

7590  
William R. Evans  
c/o Ladas & Parry  
26 West 61st Street  
New York, NY 25858

04/04/2007

EXAMINER

WARE, DEBORAH K

ART UNIT

PAPER NUMBER

1651

MAIL DATE

DELIVERY MODE

04/04/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

09/702,037

Applicant(s)

WHYTE, PETER BENNETT DUFF

Examiner

Deborah K. Ware

Art Unit

1651

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 12 February 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: None.  
Claim(s) objected to: None.  
Claim(s) rejected: 28-39, 46-48, 74 and 75.  
Claim(s) withdrawn from consideration: None.

**AFFIDAVIT OR OTHER EVIDENCE**


8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

Continuation of 11. does NOT place the application in condition for allowance because: the prior art (specifically Clark et al) do teach that proper nutritional intake and IgF-1 levels be maintained to achieve weight reduction and improved body condition, note page 44, lines 1-3. Furthermore, colostrum is taught to be a replacement source of IgF in the body. These teachings suggest that body mass and stature can be monitored to observe change in the physical work capacity of a subject. Therefore, contrary to Applicant's argument that a prima facie case of obviousness has not been presented, the prior art do suggest or teach each of the claim limitations and the art is combined to show that there is indeed motivation to change physical work capacity of a subject by the subject ingesting a food composition containing a colostrum fraction and the art clearly teaches and recognizes how such fractions are prepared. For these reasons and those record the claims remain rejected over the cited prior art. Also the affidavit is noted but there is an expectation of successful results to replace IgF with a colostrum fraction if so desired and calculated results are not reflected in the instant claims. No unexpected successful results have been obtained based upon a reading of the cited prior art. To prepare a colostrum fraction is well recognized and to ingest it for improving the physical work capacity of a subject is also suggested. Also Applicants argue features which are not claimed such as human IgF 1. The new claim added would be rejected possibly under 35 USC 112, second paragraph and over the prior art rejection of record because because monitoring body mass and stature is clearly suggested by Clark et al, as discussed above. Thus, although the new claim is deemed by the Examiner to possibly introduce a new issue under 35 USC 112, second paragraph, she decided it would be prudent to allow its entry after final because the art of record does read on the new claim as well in terms of monitoring body mass and stature of a subject. However, the Examiner did not permit entry of the affidavit because the affidavit is not directed to the amounts as claimed and Applicants did not provide a showing of good and sufficient reasons why the calculated results of current technology are needed because these amounts are not being claimed, and further Applicant also did not show a good and sufficient reason why the affidavit was not presented earlier.

DFW  
1651

  
DAVID M. NAFF  
PRIMARY EXAMINER  
ART UNIT 1281457